

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-527

COMMONWEALTH

vs.

STEPHEN A. BERNARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a probation violation hearing, the defendant was found to be in violation of the terms of his probation and received a sentence in the house of correction. He appeals, arguing that he did not receive fair warning about what conduct would constitute a violation of probation and, further, that there was insufficient evidence to prove that he in fact committed that violation. We affirm.

On September 27, 2016, the defendant, Stephen A. Bernard, pleaded guilty to three counts of assault by means of a dangerous weapon under G. L. c. 265, § 15B (b). He received concurrent six-month sentences that were suspended until March

27, 2018. As a condition of his probation, the defendant was ordered to "stay away" and to have "no contact with victims."<sup>1,2</sup>

On May 1, 2017, the defendant was given notice that he was alleged to have violated the terms of his probation, specifically, "Failure to Stay Away/Have no Contact with" one of the named victims (hereafter, victim). After a May 11, 2017 hearing, the judge found the defendant in violation and ordered him committed to the house of correction for six months on count one and for two years on counts two and three. A single justice of the Appeals Court allowed a late notice of appeal, and the defendant filed his notice of appeal on November 15, 2017.

1. Factual background. The defendant lived "a few houses down" from the victim, on the same street in Taunton. The victim also worked on the same street, across the street from the house in which she lived. On May 1, 2017, the victim photographed the defendant standing in close proximity to her

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<sup>1</sup> Three individuals were listed as victims in the complaint, one for each count.

<sup>2</sup> The defendant signed an order of probation conditions, which included, specifically, the term "HAVE NO CONTACT WITH and STAY . . . AWAY FROM: Named Victims." In addition, on the defendant's tender of plea (green sheet), the defendant included a specific recommendation that he stay away from and have no contact with the victims. Although the prosecutor recommended a split sentence of commitment, the prosecutor also recommended a stay away/no contact order. The judge's proposed disposition included an order to "stay away, no contact with victims." The defendant then signed the tender, indicating that he accepted the judge's proposed disposition.

workplace and residence.<sup>3</sup> The victim's photos were admitted as exhibits at the hearing. They depict the defendant "right next to [the victim's] house," walking on the sidewalk outside the victim's workplace, and sitting on a stone wall on the victim's neighbor's property. The victim testified that she took the photos at various times throughout the day using either her cell phone or her digital camera. She testified that the defendant "just sits and looks over at" her house and that it made her "feel very intimidated."

The victim also testified about a videotape of the defendant turning around in her neighbor's driveway and driving past her house. This incident prompted the victim to call the police. On another occasion, April 16, 2017, the victim stated that the defendant walked past her house three or four times and sat on her neighbor's wall. "That day, he drove by and then . . . when he came down walking and spent the day walking back and forth between his house and my house and sitting on the wall." She agreed, however, that the defendant had not attempted conversation with her at any of those times.

The defendant's probation officer also testified at the hearing. He said that he had warned the defendant "on numerous occasions to avoid that part of the neighborhood, to drive the

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<sup>3</sup> Most of the photographs of the defendant were taken while the victim was at work.

opposite way." The probation officer continued, "[the defendant] always seems to be hanging out where the victim is. I don't think that's [a] coincidence. I think that's a deliberate intention to let his victim know he's there to intimidate her."

2. Discussion. The defendant argues that he did not receive fair notice of the special conditions of his probation because the court imposed "a general stay away order without providing a specified distance." We disagree.

Due process "requires that a defendant sentenced to probation receive a fair warning of conduct that may result in the revocation of probation." Commonwealth v. Ruiz, 453 Mass. 474, 479 (2009). "A judge's inquiry whether a defendant has received the required 'fair notice' is not 'confined to the four corners of the probation order'; rather, the order's meaning may be illuminated by the judge's statements and other events that are part of the notification process." Id. at 479-480, quoting United States v. Gallo, 20 F.3d 7, 12, 13 (1st Cir. 1994).

"[B]efore a defendant's term of probation can be modified or revoked on the basis that he violated a probationary condition, he must have adequate notice that the condition of probation is in effect." Commonwealth v. Bunting, 458 Mass. 569, 573 (2010). "The notice requirement can be satisfied by 'an imprecise but comprehensible normative standard so that [people] of common

intelligence will know its meaning.'" Commonwealth v. Kendrick, 446 Mass. 72, 75 (2006), quoting Commonwealth v. Orlando, 371 Mass. 732, 734 (1977).

This court "has read a probation condition of 'no contact' as a strict bar against proximity or encounters of any type. In Commonwealth v. Tate, 34 Mass. App. Ct. 446 (1993), evidence of a defendant's standing on the victim's street and watching her walk away, even where her street was just a ten minute walk from where he lived, warranted a finding that he had violated a 'no contact' condition. Id. at 449-450. The implication of Commonwealth v. Delaney, 36 Mass. App. Ct. 930, 930 n.2 (1994), is similar: that a defendant's mere presence in a car in the driveway of his former wife's house, if proved, would violate his probation condition to have 'no contact' with his former wife." Kendrick, 446 Mass. at 75.

Courts also have analyzed "no contact" and "stay away" orders in the context of orders pursuant to G. L. c. 209A, and have assessed probation orders with that in mind. See Kendrick, supra at 75-76 ("Massachusetts appellate courts have interpreted the term 'no contact' in the related context of G. L. c. 209A protective orders to foreclose a myriad of potential encounters, engagements, or communications between people. A person subject to a G. L. c. 209A 'no contact' order violates it by communicating by any means with a protected party or merely by

being near that person. Commonwealth v. Finase, 435 Mass. 310, 314 [2001]").

In Commonwealth v. Watson, 94 Mass. App. Ct. 244, 249 (2018), we addressed this issue in the context of an order to "stay away" from the plaintiff's residence. The defendant in Watson was convicted of violating the stay away order, despite the fact that he never entered the plaintiff's multifamily dwelling or made contact with her in any way.

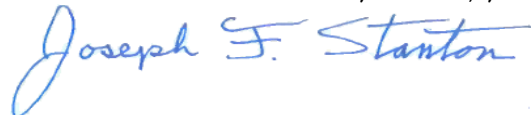
"The word 'away' denotes distance -- a distance the defendant must be 'from the residence,' but the word 'away' does not give rise to a boundary that is mathematically precise. Instead, mindful of the purpose of this aspect of c. 209A orders, we conclude that a defendant may also be found to have failed to 'stay away' where, although outside the property boundary, he nonetheless has positioned himself sufficiently proximate to it that he would be able to abuse or to contact the plaintiff, in the event that the plaintiff were on the property, or entering or leaving it. See Commonwealth v. Telcinord, 94 Mass. App. Ct. 232, 242 (2018); Commonwealth v. Goldman, 94 Mass. App. Ct. 222, 223 (2018). Compare State v. Williams, 226 N.C. App. 393, 410 (2013) ('Certainly the order must mean that defendant could not be so close . . . that he would be able to observe her, speak to her, or intimidate her in any way'). We reach this conclusion based not only on the common understanding of the phrase 'stay away' but also on its meaning within the specific framework and design of the abuse prevention order -- to provide a 'safe haven' 'in which no further abuse need be feared.' [Commonwealth v.] Gordon, 407 Mass. [340,] 347 [(1990)]. [Commonwealth v.] O'Shea, 41 Mass. App. Ct. [115,] 118 [(1996)]. We would fail to serve this basic purpose were we to adopt a standard that allowed a defendant to position himself or herself immediately outside the property boundary, or to stand in the plaintiff's path, such that the plaintiff was fearful to leave or return home." (Footnotes omitted.)

Watson, supra.

We are persuaded that the same reasoning applies here. There is no question that the defendant received adequate notice that his behavior would violate the condition of probation to stay away from and have no contact with the victim. Moreover, on the facts presented, the judge clearly was warranted in finding by a preponderance of the evidence that the defendant knowingly violated one of those terms. See Commonwealth v. Hill, 52 Mass. App. Ct. 147, 154 (2001) ("The standard of proof in a probation revocation proceeding is the civil standard of preponderance of the evidence rather than the criminal standard of beyond a reasonable doubt").

Order revoking probation  
affirmed.

By the Court (Wolohojian,  
Hanlon & Ditkoff, JJ.<sup>4</sup>),



Clerk

Entered: July 22, 2019.

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<sup>4</sup> The panelists are listed in order of seniority.